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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

FORREST SMITH, State Auditor of the State of Missouri, *Petitioner*,
vs.
AMERICAN BRIDGE COMPANY, a Corporation.

No. [redacted]

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

To the Honorable Harlan F. Stone, Chief Justice, and the Honorable Associate Justices, of the Supreme Court of the United States:

The petitioner, State Auditor of the State of Missouri, respectfully petitions that a Writ of Certiorari be issued in this cause to the Supreme Court of Missouri, and in support thereof, respectfully submits the following matter:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This petition is filed to obtain a review of a final judgment of the Supreme Court of the State of Missouri, dated April 3, 1944, opinion filed February 7, 1944, in the case of American Bridge Company, a corporation, vs. Forrest Smith, State Auditor of the State of Missouri. 179 S. W. 2d 12. The case was submitted to Division 1, of the Supreme Court of Missouri, which wrote the opinion submitted in the record herewith. (R. folio 80-90.)

Motion for rehearing was denied and on April 3, 1944, petitioner's motion to transfer the cause to Court en Banc was overruled. By that opinion the court held that the exemption section of the Missouri Sales Tax Act (Section 11409, R. S. 1939 as amended, Laws 1941, pages 698 to 714 exempts from the Missouri Sales Tax Act all sales at retail of tangible personal property, in sales transactions of interstate commerce.

The case originated in the Circuit Court of Cole County, Missouri, where a petition under the Missouri declaratory judgment law was filed by the American Bridge Company, a corporation, against the petitioner herein, alleging that it was a foreign corporation engaged in the business or occupation of fabricating and selling structural steels, which is manufactured and produced in various places outside the State of Missouri, to customers for use or consumption within the State of Missouri; that such sales were transactions in interstate commerce and by the terms of said Section 11409 of the said Missouri Retail Sales Tax Act were not taxable; praying for an order restraining petitioner from collecting the tax and for an adjudication by the court determining the taxability of said transactions, and of the rights and liabilities of said company with respect to payment and exemption from the tax.

The trial court made findings of fact, conclusions of law and entered a decree in favor of petitioner herein. (R. 56-61 Mo. Supreme Court Record).

The said American Bridge Company appealed to the Missouri Supreme Court and the case was submitted to Division 1 of that court at the September 1943 Term thereof, which court on the 7th day of February 1944, rendered an opinion holding that the transactions involved in the

case were transactions in interstate commerce and that by virtue of the provisions of Section 11409 R. S. 1939 as amended, Laws of Missouri 1941, pages 698 to 714, l. c. 702 were exempt from the said Missouri Sales Tax Act.

The Missouri Supreme Court in said opinion held that said section 11409 was a reasonable classification (R. folio 88), of retail sales and that by it all sales at retail of tangible personal property in sales transactions of interstate commerce were exempt from the Missouri Sales Tax Act.

The facts involved in this case and upon which the Supreme Court based its decision and judgment are not in dispute and are set forth in the opinion of the court. (R. folio 82.)

It was conceded by all parties and found by the Supreme Court of Missouri, that the transactions here involved were in interstate commerce and that the only question involved was whether or not such transactions were exempted from the Missouri Sales Tax Act by virtue of the provisions of said exemption section number 11409, Laws of Missouri 1941, pages 698 to 714, the pertinent portion of which reads as follows:

> "There is hereby specifically exempted from the provisions of this article and from the computation of the tax levied, assessed or payable under this article such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state."

The pertinent portions of Section 11408, Laws of Missouri 1941, which petitioner claims to impose a tax on the transactions herein involved is as follows: (Laws of Missouri 1941, Page 701, Section 11408).

> "From and after the effective date of this article and up to and including December 31, 1943, there shall be and is hereby levied and imposed and there shall be collected and paid:
>
> Upon every retail sale in this State of tangible personal property a tax equivalent to two (2%) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2%) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange.**********"

The tax involved in this action is 2% of the proceeds derived by the American Bridge Company from sales of tangible personal property to purchasers in Missouri for use and consumption in Missouri.

The position taken by each of the parties with respect to the application of said exemption Section 11409 Laws of Missouri 1941, pages 698 to 714 is as follows:

The petitioner took the position that this section only exempted from the provisions of said Sales Tax Act; (a) such retail sales as may be made between the State of Missouri and any other state of the United States which the State of Missouri is prohibited from taxing under the constitution or laws of the state; (b) any retail sale that the State of Missouri is prohibited from taxing under the constitution or laws of the United States of America, and that a construction of this section giving a blanket exemption to such retail sales would render the section uncon-

stitutional because it would unreasonably discriminate against retailers in Missouri who only dealt in intrastate retail sales transactions and in favor of retailers in Missouri who only dealt in interstate retail sales transactions.

The American Bridge Company took the position that the said section is a blanket exemption for all sales at retail in sales transactions in interstate commerce.

The Missouri Supreme Court in the aforesaid opinion sustained the position of the American Bridge Company and held that the classification was reasonable.

The petitioner in his motion for rehearing and motion to transfer to Court en Banc contended that said section as construed by the Missouri Supreme Court was unconstitutional in that it was an unreasonable classification of retail sales in this state and therefore was in violation of the equal protection clause of the 14th Amendment to the Federal Constitution.

The opinion of the Supreme Court of Missouri held that the classification of said retail sales in interstate commerce created by this exemption section is reasonable and it is this portion of the opinion which the petitioner seeks to have reviewed by this Honorable Court.

STATEMENT OF BASIS OF JURISDICTION OF THIS COURT.

The statutory provision which it is believed sustains the jurisdiction of this court is Section 237B of the Federal Judicial Code (28 U. S. C. A. Section 344 (b).

Petitioner also relies on Rule 38 of the Rules of this Court, and particularly on Paragraph 5 thereof.

The date of the decree to be reviewed is April 3, 1944 (date motion to transfer to Court en Banc was overruled)

and the opinion of the Supreme Court of Missouri is attached to the printed record to be furnished with this application for Writ of Certiorari. (R. folio 80-90.)

STATEMENT OF QUESTION PRESENTED.

The sole question presented in this case is whether or not Section 11409 of the Missouri Sales Tax Act, Laws of Missouri 1941, pages 698 to 714, as construed by the Missouri Supreme Court creates an unreasonable classification of retail sales and therefore violates the equal protection clause of the 14th Amendment to the Federal Constitution of the United States.

THE STAGE OF PROCEEDINGS, COURT IN WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

The constitutionality of said exemption section Number 11409, Laws of Missouri 1941, page 702, was raised by petitioner in Sections 6 to 9, in his motion for rehearing of the opinion rendered by the Missouri Supreme Court (R. folio 95-96) the pertinent portion of which is as follows: (R. folio 87-88)

> "The strict construction of the exemption section should not force the conclusion that the legislature intended other than that which it expressed in plain language, if the exemption as expressed in plain language is reasonable. The legislature did not express an intention that only retail sales in interstate commerce transactions which infringe the Commerce Clause should be exempted, and to so construe the section would greatly limit the embrace of the exemption.

"It must be conceded that the Sales Tax Act, if applicable to the sales in controversy, does not aim at, or discriminate against interstate commerce, and imposes the same burden upon the sales in controversy as is imposed upon sales in intrastate commerce. To construe the exemption section to include sales of tangible personal property in which the transfer of ownership, or title to, the property occurs after the property has come to its destination in this state, would exempt *sales at retail* in the state with resultant loss of revenue, although the personalty so sold, being at the end of its journey within Missouri was consequently receiving the protection of the state's laws. And a construction of the exemption section which would exempt sales in interstate commerce which the state may otherwise tax—the purchasers of goods from sellers in intrastate commerce being required to pay the sales tax, and purchasers of sales in interstate commerce (otherwise taxable) not being obliged to pay—would place sellers in intrastate commerce in a position of competitive disadvantage. Of such a tax, although imposed upon a taxable event an integral part of a transaction of interstate commerce, it is now written that the burden of such a tax upon interstate commerce is merely incidental or consequential. However, we have found it no where written that such a tax does not burden interstate commerce. We may assert that there are reasonable men who believe such a tax subversive to the freedom of commercial intercourse among the states, tending to deprive purchasers and customers of one nation of the free enjoyment of the markets of the nation. We are herein interested in the latter view only insofar as it may tend to justify the exemption expressed by plain language in the section as a reasonable one.

"If it was the intention of the legislature to exempt, from the provisions of the Sales Tax Act, retail sales in the transactions of interstate commerce, since such exemption is reasonable, it cannot be successfully

urged that the application of the exemption to the sales in controversy is invalid because apparently unjust in that it would place sellers in intrastate commerce in a position of competitive disadvantage."

The petitioner in his motion for rehearing and motion to transfer to Court en Banc contended that such a construction placed on said section by the Missouri Supreme Court, rendered it unconstitutional and void because it arbitrarily and unreasonably classified retail sales transactions in interstate commerce in an exempt class from retail sales transactions in intrastate commerce, contrary to the equal protection clause of the 14th Amendment to the Federal Constitution of the United States, which motions for rehearing and transfer to Court en Banc were overruled by said Supreme Court.

The petitioner under the rule announced by this court in the case of Brinkerhoff-Farris Trust & Savings Company vs. Hill 281 U. S. 673; 73 L. Ed. 1107; 50 Sup. Court 451, 453; in his motion for rehearing and in his motion to transfer to Court en Banc, contended that the constitutionality of said exemption section first came into the case when the Missouri Supreme Court in its opinion ruled that the classification of retail sales made by this section is reasonable.

STATEMENT OF REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

1. The decision of the Supreme Court of Missouri is upon an important question of Federal Law which has not been directly passed upon by this court.

2. The decision of the Missouri Supreme Court is probably not in accord with applicable decisions of this court.

3. The question is frequently presented in the administration by the State Auditor of Missouri of the Missouri Sales Tax Act under consideration, and is similarly presented in the administration of acts in numerous states where excise tax laws have been enacted.

4. The decision of the Missouri Supreme Court is in conflict with principles established by prior decisions of this court.

5. By the language of the opinion hereinbefore set out the petitioner submits that the Missouri Supreme Court ruled that said exemption section exempting from the Missouri Sales Tax Act all sales at retail in sales transactions of interstate commerce was reasonable and not in violation of the equal protection clause of the 14th Amendment to the Federal Constitution of the United States.

WHEREFORE, Your petitioner pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, commanding that Court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 38677, September Term 1943, American Bridge Company, a corporation, Appellant, vs. Forrest Smith, State Auditor of the State of Missouri, Respondent, and that the said judgment of the Supreme Court of Missouri may be reversed by this Honorable Court, and

that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

ROY McKITTRICK,
Attorney-General,

TYRE W. BURTON,
J. W. THURMAN,
D. A. THOMPSON,
WM. G. MARBURY,
Counsel for Petitioner.

SUMMARY OF ARGUMENT.

I.

The Supreme Court of Missouri in its opinion held that Section 11409 of the Missouri Sales Tax Act, Laws of Missouri 1941, pages 698 to 714, exempts from the provisions of said act all sales at retail in sales transactions in interstate commerce and that the classification of such sales was reasonable and not in violation of the equal protection clause of the 14th Amendment to the Federal Constitution.

(a) The Missouri Supreme Court held that the classification of retail sales included in Section 11409 is reasonable.

(b) Same rule must be used for taxing foreign corporations as is used for domestic corporations for the same privilege.

(c) The exemption section as construed by the Missouri Supreme Court would deny equal protection of the laws to the retailer dealing only in intrastate transactions.

(d) The Missouri Legislature acted beyond its authority in exempting retail sales transactions in interstate commerce from the provisions of the Sales Tax Act.

(e) The equal protection clause applies to retailers in intrastate commerce as well as to retailers in interstate commerce.

(f) The classification of sales at retail in the sales transactions of interstate commerce is not reasonable.

II.

Stage in proceedings in the court of first instance and appellate court at which and the manner in which the Federal question sought to be reviewed was raised.

ARGUMENT.

THE MISSOURI SUPREME COURT HELD THAT THE CLASSIFICATION OF RETAIL SALES INCLUDED IN SECTION 11409 IS REASONABLE.

I.

(a) The Missouri Supreme Court in its opinion in this case (Missouri Opinion February 7, 1944) held that the Missouri Sales Tax Act Laws of Misssouri 1941, pages 698-714, by section 11409 thereof exempts from the provisions of the Act all sales at retail in sales transactions in interstate commerce, and that the classification of such retail sales was reasonable and not in violation of the equal protection clause of the 14th Amendment to the Federal Constitution.

The portion of the opinion in which the court considered and ruled on the constitutionality of the exemption section is as follows: (R. folio 87-88)

> "The strict construction of the exemption section should not force the conclusion that the legislature intended other than that which it expressed in plain language, if the exemption as expressed in plain language is reasonable. The legislature did not express an intention that only retail sales in interstate commerce transactions which infringe the Commerce Clause should be exempted, and to so construe the section would greatly limit the embrace of the exemption.
>
> "It must be conceded that the Sales Tax Act, if applicable to the sales in controversy, does not aim at, or discriminate against interstate commerce, and imposes the same burden upon the sales in controversy

as is imposed upon sales in intrastate commerce. To construe the exemption section to include sales of tangible personal property in which the transfer of ownership, or title to, the property occurs after the property has come to its destination in this state, would exempt *sales at retail* in the state with resultant loss of revenue, although the personalty so sold, being at the end of its journey within Missouri was consequently receiving the protection of the state's laws. And a construction of the exemption section which would exempt sales in interstate commerce which the state may otherwise tax the purchasers of goods from sellers in intrastate commerce being required to pay the sales tax, and purchasers of sales in interstate commerce (otherwise taxable) not being obliged to pay—would place sellers in intrastate commerce in a position of competitive disadvantage. Of such a tax, although imposed upon a taxable event an integral part of a transaction of interstate commerce, it is now written that the burden of such a tax upon interstate commerce is merely incidental or consequential. However, we have found it no where written that such a tax does not burden interstate commerce. We may assert that there are reasonable men who believe such a tax subversive to the freedom of commercial intercourse among the states, tending to deprive purchasers and customers of one nation of the free enjoyment of the markets of the nation. We are herein interested in the latter view only insofar as it may tend to justify the exemption expressed by plain language in the section as a reasonable one.

"If it was the intention of the legislature to exempt, from the provisions of the Sales Tax Act, retail sales in the transactions of interstate commerce, since such exemption is reasonable, it cannot be successfully urged that the application of the exemption to the sales in controversy is invalid because apparently unjust in that it would place sellers in intrastate commerce in a position of competitive disadvantage."

The petitioner in his brief to the Missouri Supreme Court, in support of his contention that the section would be in violation of the equal protection clause of the 14th Amendment to the Federal Constitution, if given a construction such as the one which the Missouri Supreme Court placed on it, cited Erie R. R. Company v. Tompkins 304 U. S. 64, 72 L. Ed. 1188, 58 S. Ct. 817; Frost v. Corporation Commission of State of Oklahoma 278 U. S. 515, 73 L. Ed. 483, 49 S. Ct. 235; Southern Railway Company v. Greene 216 U. S. 400, 54 L. Ed. 536, 30 S. Ct. 287, 291 and Vol. 11 Am. Jur. 95 Sec. 108; Gwin et al v. Henneford 305 U. S. 434, 83 L. Ed. 272, 59 S. Ct. 325.

SAME RULE MUST BE USED FOR TAXING FOREIGN CORPORATIONS AS IS USED FOR DOMESTIC CORPORATIONS FOR THE SAME PRIVILEGE.

(b) The authorities cited, supra, apply the principle that foreign corporations may not be taxed for carrying on a business by a different and more onerous rule than is used in taxing domestic corporations for the same privilege, because such a tax would be a denial of the equal protection of the laws.

In Southern Railway Company v. Greene, supra, Mr. Justice Day in delivering the opinion of the court, said l. c. 291.

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

The same principle applies to persons as to corporations. Southern R. R. Company v. Greene, supra.

THE EXEMPTION SECTION AS CONSTRUED BY THE MISSOURI SUPREME COURT WOULD DENY EQUAL PROTECTION OF THE LAWS TO THE RETAILER DEALING ONLY IN INTRASTATE TRANSACTION.

(c) The part of the opinion of the Missouri Supreme Court which held that the exemption section exempts all sales at retail in sales transactions of interstate commerce is as follows:

> "The failure of the legislature to enact a general compensating use tax, and the failure of the legislature to amend by expressly restricting the exemption section to exempt only retail sales in interstate commerce which infringe the Commerce Clause, lend support to our conclusion *that the legislature intended that the section should exempt all sales at retail in the sales transactions of interstate commerce." (Emphasis ours.)*

In Southern Railway Company v. Greene, supra, l. c. 289, the court said:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the state of Alabama within the meaning of the 14th Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."

Also in 12 Am. Jur. Page 235 Sec. 537, the rule is stated that

> "A statute which discriminates unjustly against residents in favor of nonresidents violates the equal protection clause."

The Retail Sales Tax Act imposes a tax of 2% of the sale price of certain tangible personal property sold at retail for use and consumption in the state and requires the retailer to collect the tax from the purchaser and report and pay same to the State Auditor.

Under the construction by the Missouri Supreme Court placed on Section 11409, the retailer who makes sales transactions in which interstate commerce is involved does not come within the provisions of the Act, while the retailer who sells the same kind of articles and under same conditions, except his sales are intrastate transactions, must collect and pay the tax. The result of such a classification is to give the retailer in interstate transactions a margin of 2% advantage over the retailer in intrastate transactions.

THE MISSOURI LEGISLATURE ACTED BEYOND ITS AUTHORITY IN EXEMPTING RETAIL SALES TRANSACTIONS IN INTERSTATE COMMERCE FROM THE PROVISIONS OF THE SALES TAX ACT.

(d) It is the contention of the petitioner that the Missouri Sales Tax Act without the provisions of the exemption section 11409 is limited in its scope to sales transactions in interstate commerce by the provisions of the Federal Constitution and that any attempt by the Legislature to extend the scope of the tax beyond the limits prescribed by the Federal Constitution is unauthorized.

In the case of Spector Motor Service v. Walsh, 139 Fed (2nd) 809, 816 Cirucit Judge Clark of the Circuit Court of Appeals of the Second Circuit in treating this subject quoted the dissent of Mr. Justice Black in Gwin, White & Prince v. Henneford, supra, as follows:

"I would return to the rule that except for state acts designed to impose discriminatory burdens on interstate commerce because it is interstate—Congress alone must determine how far (interstate commerce) shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited. (Welton v. Missouri, 91 U. S. 275, 280, 23 L. Ed. 347.) By 1940, Mr. Justice Black had been joined by Justices Douglas and Frankfurter in dissent in McCarroll v. Dixie Greyhound Lines, 309 U. S. 176, 189, 60 S. Ct. 504, 510, 84 L. Ed. 683, where they said: Unconfined by the "narrow scope of judicial proceedings Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union."

It will be noted from the foregoing that Congress alone must determine how far interstate commerce shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited. It will also be noted from the foregoing that Mr. Justice Douglas and Mr. Justice Frankfurter joined in this view in McCarroll v. Dixie Greyhound Lines, 309 U. S. 176, 189, 60 S. Ct. 504, 510, 84 L. Ed. 683.

If this is the rule then the Missouri Legislature was without authority in attempting by the exemption section to exempt retail sales transactions in interstate commerce from the provisions of the Act because that is a power which Congress alone may exercise.

In Spector Motor Service v. Walsh, supra, the Circuit Court of Appeals of the Second Circuit held that a Con-

necticut Corporation Business Tax which imposed a tax on the privilege of doing a business within that state measured by net income, was applicable to allocated local business of foreign motor carrier whose entire business was in interstate commerce but which had qualified to do business in that state and maintained terminals there.

In discussing the discriminatory features of this Act, the court at l. c. 817 said:

> "Here this tax certainly cannot be considered discriminatory. It is levied on all corporations carrying on business within the state, local corporations paying at the same rate as foreign ones, and with most careful provisions for the ascertainment of only income produced within the state. Indeed, if we should strike down the tax against plaintiff, we would be discriminating against intrastate business, which would still have its burdens to pay under the tax and which is just as much entitled to constitutional protection from discrimination as interstate commerce, as the dissents of Mr. Justice Brandeis and Mr. Justice Black, cited above, in particular have pointed out."

So it will be seen that this Circuit Court of Appeals has applied the principle that intrastate business is entitled to the same protection as interstate business and that discrimination against either is equally repugnant to the equal protection clause of the 14th Amendment to the Federal Constitution.

THE EQUAL PROTECTION CLAUSE APPLIES TO RETAILERS IN INTRASTATE COMMERCE AS WELL AS TO RETAILERS IN INTERSTATE COMMERCE.

(e) In the rules stated, supra, legislation which favors intrastate commerce over interstate commerce violates the

equal protection clause of the 14th Amendment. In the case at bar we have a case where interstate commerce is favored over intrastate commerce.

In Gwin et al v. Henneford, supra, Mr. Justice Black in a dissenting opinion, said l. c. 329, 332, 335.

> "Equality is the theme that runs through all the sections of the statue of the State of Washington here considered. The statute imposes a general, non-discriminatory tax measured by gross receipts—upon all businesses operating in that State. The intended equality of the statute will become unequality by the judgment of this Court here, because appellant and all other businesses in Washington that receive income for selling Washington products in that and other States, are exempted from the tax. Appellant is exempted from past, present and future payments of this tax. Not so, however, as to past, present, or future payments by Washington businesses selling only to citizens of that state. They must bear the entire burden of the tax. Thus the judgment here, framed to prevent conjectured future, possible—not present and and actual—discrimination against interstate commerce, makes of this statute with equality as its theme, an instrument of discrimination against Washington intrastate businesses. Appellant, a Washington agent or broker selling Washington products in that State and elsewhere, can now do so freed from this business tax. Washington agents and brokers selling the same products to Washington citizens (and all other local businesses) must pay. Washington's intra-state commerce thus will "pay its way;" interstate commerce need not."
>
> "A State's taxes are not discriminatory if the State treats those engaged in interstate and intra-state business with equality and justice."

Also in Ozark Pipe Line Corporation v. Monier et al, 266 U. S. 555, 69 L. Ed. 439, 45 S. Ct. 184, a tax upon the

privilege to do business in the State of Missouri was before the court. The Pipe Line Company did both intrastate and interstate business. This court held that the tax could not be imposed. However, Mr. Justice Brandeis in a dissenting opinion announced the rule similar to that of Mr. Justice Black in the case of Gwin, White & Price et al v. Henneford, supra, and said at l. c. 187.

> "If the tax is held void, the statute will, in fact, discriminate against intrastate commerce for the tax is confessedly valid as applied to all corporations which do not engage exclusively in interstate commerce."

The above dissents of Mr. Justice Black and Mr. Justice Brandeis support petitioners position that if the retailer who engages in retail sales transactions of interstate commerce is exempt under the act, then retailers who engage in sales in retail sales transactions of intrastate commerce are discriminated against.

Such a construction would mean that all retailers making sales transactions in interstate commerce which do a vast amount of business in the state, will escape completely from the provisions of the Retail Sales Tax Act and they will have a 2% margin over retailers engaged exclusively in intrastate retail sales transactions.

The Missouri Supreme Court had before it the case of State v. Distilling Company, 139 S. W. 453, 236 Mo. 219. In this case the court in speaking of discriminatory legislation referred to a statement of the Supreme Court of the United States in the case of Scott v. Donald, 165 U. S. 98, wherein the court said l. c. 315.

> "The Supreme Court of the United States, in the case of Scott v. Donald, 165 U. S. 98 has expressed the same views. This case involved the constitutionality

of the law known as the "South Carolina Dispensary Law." In discussing the application of the Wilson Act to that law, the court, on page 100, said: "The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. *But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful." (Emphasis ours.)*

Applying this principle here, the Missouri Legislature has attempted to discriminate between interstate and domestic commerce which under this rule the Legislature cannot do.

THE CLASSIFICATION OF SALES AT RETAIL IN THE SALES TRANSACTIONS OF INTERSTATE COMMERCE IS NOT REASONABLE.

(f) The only reason that the Missouri Legislature could have had for exempting sales at retail in sales transactions of interstate commerce was that the transactions were in interstate commerce, even though commerce is not unconstitutionally burdened by the tax.

Petitioner submits that this is not a reasonable classification. In Louisville Gas & Electric Company v. Coleman, 277 U. S. 32, 72 L. Ed. 770, 48 Sup. Ct. 423, this court held that it is not bound by highest state court's characterization of state tax, as respects its effect under the equal protection clause and held that a statute of Kentucky which

imposed a tax on mortgages which do not mature in five years was an arbitrary and unreasonable classification of such mortgages and void under the equal protection clause. Mr. Justice Sutherland in delivering the opinion and speaking of the equal protection clause said l. c. 425.

> "It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility provided always that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.
>
> "But classification good for one purpose may be bad for another; and it does not follow that, because the state may classify for the purpose of proportioning the tax it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt.
>
> "Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property."

In Colgate v. Harvey, 296 U. S. 404, 56 Sup. Ct. 252, 260, 80 L. Ed. 299, 102 A. L. R. 54, this court had before it an

income tax act of the State of Vermont. Mr. Justice Sutherland delivered the opinion and in speaking of the statute as here applied said l. c. 260.

> "The statute, as here applied, says that if a citizen resident of Vermont loan his money at 5 per cent. or less in another state, he must pay a tax upon the income; but if he loan money in Vermont at the same rate, no tax whatever shall be imposed. The power to tax income here asserted by Vermont is, in the final analysis, the power to tax so heavily as to preclude loans outside the state altogether. It reasonably is not open to doubt that the discriminatory tax here imposed abridges the privilege of a citizen of the United States to loan his money and make contracts with respect thereto in any part of the United States."

This case was overruled in Madden v. Commonwealth of Kentucky et al 309 U. S. 83, 60 Sup Ct. 406, however Mr. Justice Roberts in a dissent adhered to the views expressed in Colgate v. Harvey, supra.

II.

STAGE IN PROCEEDINGS IN THE COURT OF FIRST INSTANCE AND APPELLATE COURT AT WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

The petitioner in the trial court took the position that the exemption section 11409, Laws of Missouri 1941, page 702, here under consideration, was not a blanket exemption to all sales at retail in sales transactions of interstate commerce, but only exempted such sales transactions as the State of Missouri is prohibited from taxing under the Federal Constitution, contending that to construe said section as a blanket exemption of such sales from the tax

would be in violation of the equal protection clause to the Federal Constitution, because it would favor retailers making sales involving interstate retail sales transactions over retailers making retail sales only in intrastate transactions.

The unconstitutionality of the exemption section if construed as a blanket exemption was not raised in the pleadings in the trial court because petitioner at that time did not anticipate the court would construe it as a blanket exemption of all retail sales transactions in interstate commerce. The trial court in its memorandum (R. 57-61) held that it was not a blanket exemption and it was therefore unnecessary at that time to pass on the constitutionality of this section with respect to the equal protection clause of the 14th Amendment to the Federal Constitution. When the case was presented to the Missouri Supreme Court, the petitioner took the same position as to the construction which should be placed on said section 11409 as he did in the trial court. The portion of the opinion of the Missouri Supreme Court which petitioner relies on as sustaining his claim that that court passed on the constitutionality of said section is as follows (R. folio 87-88):

> "The strict construction of the exemption section should not force the conclusion that the legislature intended other than that which it expressed in plain language, if the exemption as expressed in plain language is reasonable. The legislature did not express an intention that only retail sales in interstate commerce transactions which infringe the Commerce Clause should be exempted, and to so construe the section would greatly limit the embrace of the exemption.
>
> "It must be conceded that the Sales Tax Act, if applicable to the sales in controversy, does not aim at, or discriminate against interstate commerce, and imposes the same burden upon the sales in controversy

as is imposed upon sales in intrastate commerce. To construe the exemption section to include sales of tangible personal property in which the transfer of ownership, or title to, the property occurs after the property has come to its destination in this state, would exempt *sales at retail* in the state with resultant loss of revenue, although the personalty so sold, being at the end of its journey within Missouri was consequently receiving the protection of the state's laws. And a construction of the exemption section which would exempt sales in interstate commerce which the state may otherwise tax—the purchasers of goods from sellers in intrastate commerce being required to pay the sales tax, and purchasers of sales in interstate commerce (otherwise taxable) not being obliged to pay—would place sellers in intrastate commerce in a position of competitive disadvantage. Of such a tax, although imposed upon a taxable event an integral part of a transaction of interstate commerce, it is now written that the burden of such a tax upon interstate commerce is merely incidental or consequential. However, we have found it no where written that such a tax does not burden interstate commerce. We may assert that there are reasonable men who believe such a tax subversive to the freedom of commercial intercourse among the states, tending to deprive purchasers and customers of one nation of the free enjoyment of the markets of the nation. We are herein interested in the latter view only insofar as it may tend to justify the exemption expressed by plain language in the section as a reasonable one.

"If it was the intention of the legislature to exempt, from the provisions of the Sales Tax Act, retail sales in the transactions of interstate commerce, since such exemption is reasonable, it cannot be successfully urged that the application of the exemption to the sales in controversy is invalid because apparently unjust in that it would place sellers in intrastate commerce in a position of competitive disadvantage."

From the language expressed in the opinion as quoted above, it will be seen that the Missouri Supreme Court considered the section from the standpoint of whether or not the classification between interstate and intrastate commerce was reasonable. It will be noted that the court in this opinion wherein it discussed the rule of strict construction as to the application of the exemption section held that the application of such a rule "should not force the conclusion that the legislature intended other than that which it expressed in plain language" if the classification was reasonable. It will also be noted that the court in the opinion made the statement that "it must be conceded that the Sales Tax Act, if applicable to the sales in controversy, (i. e. if not exempted by Section 11409) does not aim at, or discriminate against interstate commerce, and imposes the same burden as it imposed upon sales in intrastate commerce." The court also stated in the opinion (R. 87) to the effect that there are reasonable men who believe "such a tax subversive to the freedom of commercial intercourse among the states, tending to deprive purchasers and customers of one nation of the free enjoyment of the markets of the nation" and said:

> "We are herein interested in the latter view (that it is subversive to the freedom of commercial intercourse among the states, tending to deprive purchasers and customers of one nation of the free enjoyment of the markets of the nation) only insofar as it may tend to justify the exemption expressed by plain language in the section as a reasonable one." (Insert ours)

From this language, respondent submits that it further appears that the Missouri Supreme Court considered this exemption section from the standpoint of it being a reason-

able classification. In other words, whether or not it complied with the provisions of the equal protection clause of the 14th Amendment to the Federal Constitution. Then following the foregoing statement, (R. 88) the court used this language which the petitioner contends that the court definitely ruled that the exemption section complied with the provisions of the equal protection clause of the 14th Amendment to the Federal Constitution when it said:

> "If it was the intention of the legislature to exempt, from the provisions of the Sales Tax Act, retail sales in the transactions of interstate commerce, *since such exemption is reasonable*, it cannot be successfully urged that the application of the exemption to the sales in controversy is invalid because apparently unjust in that it would place sellers in intrastate commerce in a position of competitive disadvantage." *(Emphasis ours)*

By this language, the Missouri Supreme Court definitely held that the exemption section is reasonable and that it could not be urged that the application of the exemption section to the sales in controversy is invalid, that is, that it violates the equal protection clause of the 14th Amendment to the Federal Constitution, because it is apparently unjust in that it would place sellers in interstate commerce in a position of competitive disadvantage.

Therefore, it is the contention of the petitioner that the Missouri Supreme Court, irrespective of whether the validity of the exemption was attacked in the pleading, by the foregoing language, considered and passed on the constitutionality of said exemption section 11409 as it applies to the equal protection clause of the 14th Amendment to the Federal Constitution.

The petitioner submits that this court may take jurisdiction in such circumstances and we are supported by the rule announced by this court in the case of Home Insurance Company et al. v. Dick et al 281 U. S. 397, 74 L. Ed. 926, 74 A. L. R. 701, 50 S. Ct. 338 at l. c. 341 in which the court said:

> "That the federal questions were not raised in the trial court is immaterial. For the Court of Civil Appeals and the Supreme Court of the State considered the questions as properly raised in the appellate proceedings, and passed on them adversely to the federal claim." (citing cases)

Since the Missouri Supreme Court actually entertained and decided the federal question (R. folio 87-88) respondent submits that this court has jurisdiction to decide this issue.

Respondent also submits that since the trial court ruled that said section was not a blanket exemption and was therefore unnecessary to pass on the constitutionality of the section (R. 57-61) and the Missouri Supreme Court ruled that it was a blanket exemption (R. folio 90) and the petitioner having raised the validity of the exemption so construed in his motion for rehearing, (R. 95-96) then the exception to the general rule announced in the case of Herndon v. State of Georgia 295 U. S. 441, 55 S. Ct. 794, 795, could be applied here. The court in that case stated the general rule and the exception to the general rule in the following language:

> "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." (citing cases)

"Petitioner, however, contends that the present case falls within an exception to the rule namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." (cases cited)

Petitoner also calls the court's attention to the dissenting opinion in the case of Herndon v. State of Georgia, supra, written by Mr. Justice Cardozo and concurred in by Mr. Justice Brandeis and Mr. Justice Stone, in which the rule is broadened. At l. c. 799 the court said:

"Here is an unequivocal rejection of the test of clear and present danger, yet a denial also of responsibility without boundaries in time. True, in this rejection, the court disclaimed a willingness to pass upon the question as one of constitutional law, assigning as a reason that no appeal to the Constitution had been made upon the trial or then considered by the judge. Brown v. State, 114 Ga. 60, 39 S. E. 873, Loftin v. Southern Security Co., 162 Ga. 730, 134 S. E. 760; Dunaway v. Gore, 164 Ga. 219, 230, 138 S. E. 213. Such a rule of state practice may have the effect of attaching a corresponding limitation to the jurisdiction of this court where fault can fairly be imputed to an appellant for the omission to present the question sooner. Erie R. Co. v. Purdy, 184 U. S. 148, 22 S. Ct. 605, 46 L. Ed. 847; Louisville & Nashville R. C. v. Woodford, 234 U. S. 46, 51, 34 S. Ct. 739, 58 L. Ed. 1202. No such consequence can follow where the ruling of the trial judge has put the constitution out of the case and made an appeal to its provisions impertinent and futile. Cf. Missouri v. Gehner, supra; Rogers v. Alabama, 192 U. S. 226, 230, 24 S. Ct. 257, 48 L. Ed. 417. In such

circumstances, the power does not reside in a state by any rule of local practice to restrict the jurisdiction of this court in the determination of a constitutional question brought into the case thereafter. Davis v. Wechsler, 263 U. S. 22, 24, 44 S. Ct. 13, 68 L. Ed. 143. If the rejection of the test of clear and present danger was a denial of fundamental liberties, the path is clear for us to say so."

Under the foregoing authorities the petitioner respectfully submits that this cause is properly here for petition for Writ of Certiorari.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such end a writ of certiorari should be granted, and this Court should review the decision of the Supreme Court of Missouri, and finally reverse it.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

FORREST SMITH, State Auditor of the State of Missouri,
Petitioner,
vs.
AMERICAN BRIDGE COMPANY, a Corporation,
Respondent.

No. 1045.

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR AMERICAN BRIDGE COMPANY IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

FORREST SMITH, State Auditor of the State of Missouri, Petitioner, vs. AMERICAN BRIDGE COMPANY, a Corporation, Respondent.	No. 1045.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR AMERICAN BRIDGE COMPANY IN OPPOSITION.

OPINION BELOW.

The opinion of the Court below is reported at 179 S. W. (2d) 12 (Mo.).

JURISDICTION.

It is the contention of the American Bridge Company, Respondent, that the Supreme Court of the United States has no jurisdiction in this matter based on Petitioner's own statement of question presented. In Petitioner's Petition for Writ of Certiorari, under the caption, "Statement of Question Presented," we quote the following in its entirety:

> "The sole question presented in this case is whether or not Section 11409 of the Missouri Sales Tax Act, Laws of Missouri 1941, pages 698 to 714, as construed by Missouri Supreme Court, creates an unreasonable classification of retail sales and therefore violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution of the United States."

We contend that by such statement and by other admissions made by Petitioner in his Summary Statement of the matter involved, he admits that the state law above referred to, is valid, and the only question is whether it has been correctly construed, which question concerning the construction of a State revenue statute gives the Supreme Court of the United States no jurisdiction. The Supreme Court of the State of Missouri has construed the section of the Missouri laws in question, after having had before it a complete record which included all of the facts adduced by the parties at an extended trial in the lower court.

QUESTIONS PRESENTED.

I.

There were two questions at issue before the Missouri Supreme Court: one, whether the sales which were made by American Bridge Company to customers and users within the State of Missouri were **sales made in the State of Missouri**; two, whether certain types of sales made by American Bridge Company to customers for use and consumption in the State of Missouri were such sales as to be specifically exempted under Section 11409, R. S. Mo. 1939, as amended, Laws of 1941, pages 698 to 714.

There are two questions presented to this Court in considering the petition for writ of certiorari; one, whether or not a public officer has the authority to question the constitutional validity of a state revenue statute in the United

States Supreme Court, and, two, whether or not there can be any Federal question involved where a state revenue statute has been held valid and reasonable by the Missouri Supreme Court.

STATUTE INVOLVED.

The pertinent provisions of the Missouri Sales Tax Act are set forth in the Appendix, infra, page 15.

STATEMENT.

The proceedings in the present case originated in the Circuit Court of Cole County, Missouri, where the petition was filed by the American Bridge Company against the Petitioner herein under the Missouri Declaratory Judgment Act, alleging that the sales made by the American Bridge Company from outside of the State of Missouri to customers and users within the State were not taxable for two reasons: one, that a certain type of sales made by American Bridge Company were not sales within the State of Missouri and hence the State had no authority to tax same, and the Missouri Supreme Court in its opinion so found; secondly, that the other types of sales made by American Bridge Company to customers and users within the State of Missouri, all of said sales being made by shipment of products from outside of the State of Missouri into the State, were transactions in interstate commerce and were specifically exempt under Section 11409 of the Missouri Retail Sales Tax Act, and the Supreme Court of the State of Missouri in its opinion held that such sales were not taxable.

The facts show that the American Bridge Company is a foreign corporation licensed to do business in the State of Missouri, maintains a sales office in St. Louis, Missouri, but that no stock of its products is maintained in the State of Missouri. The products are consigned to pur-

chasers in some instances f. o. b. cars at the American Bridge Company's plants in other states, and in other instances f. o. b. point of destination in Missouri.

The sales involved necessitate transportation of goods from other states to users and consumers in the State of Missouri and counsel for Petitioner admitted that all of the transactions were interstate sales.

The Missouri Supreme Court in interpreting a Missouri revenue statute, held that the Sales Tax Act does not aim at or discriminate against **interstate** commerce and imposes the same burden upon the sales in controversy as is imposed upon sales in **intrastate** commerce, but that the Missouri legislature specifically exempted the type of sale involved in this case by Section 11409, R. S. of Missouri 1939, as amended, Laws of 1941, pages 698 to 714, and held that the exemption is reasonable and that such exemption was valid and would not place sellers in intrastate commerce in a position of competitive disadvantage.

Further, the Missouri Supreme Court in its opinion reviewed the Missouri Sales Tax Act from its inception and determined therefrom the correct construction of the statute based on legislative intent. The action in the state courts was the result of the State Auditor's office endeavoring by rules and regulations to enlarge the Missouri Sales Tax Act to such a degree so as to make it a **use** tax, and the Missouri Supreme Court in its opinion held that such was not proper.

ARGUMENT.

The petition for certiorari is largely devoted to the subject of endeavoring to raise a Federal question which became an afterthought theory of the Petitioner after the opinion of the Missouri Supreme Court had been rendered. In his endeavor to inject such theory in the case, the Petitioner dwelt on this subject matter by filing three different motions with the Missouri Supreme Court: one, a motion for rehearing; two, a motion for modification; three, a motion to transfer the case to the court en banc, and in all three of these motions the Petitioner endeavored to insert an issue which is not in this case. The Missouri Supreme Court denied all of Petitioner's three motions heretofore referred to.

In its statement of facts, Petitioner omits most of the important evidentiary findings upon which the Supreme Court based its ultimate determination that the sales of the type which the American Bridge Company made to users and consumers in the State of Missouri could not be taxed under the Missouri Sales Tax Act. The Number One statement in Petitioner's Petition for Certiorari is not correct for the reason that the decision of the Supreme Court of Missouri involved the construction and meaning of a revenue statute of the State. The Missouri Supreme Court has the right and final word on the interpretation of its own revenue statutes, and the decision below is proper in holding, first, that certain types of sales made by American Bridge Company were not sales made in this State (the State of Missouri) and, second, that the Legislature of Missouri intended that the exemption clause should exempt all sales at retail in the sales transactions of interstate commerce. The Supreme Court of Missouri in its decision is correct, for it presents no Federal question, no conflict of decisions, no violation of the equal pro-

tection clause of the Fourteenth Amendment to the Federal Constitution of the United States, and further presents no question of general importance. The petition for writ of certiorari should therefore be denied.

The Petitioner in the present case is Forrest Smith, State Auditor of the State of Missouri, and the petition is filed before this court for the reason that he is not satisfied with a decision of the Missouri Supreme Court involving the interpretation of a revenue statute in the State of Missouri.

A State Public Officer Has No Right to Question the Validity of a State Revenue Statute Before the United States Supreme Court.

It has been held by this Court that the authority of a public officer to assail in the courts of the State the constitutional validity of a state statute is a local question not reviewable by the United States Supreme Court. The constitutional protection of the Fourteenth Amendment against state action does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied equal protection of the laws.

The United States Supreme Court, in the case of Columbus and Greenville Railroad Co. v. W. J. Miller, State Tax Collector, 283 U. S. 96, 75 Law Ed. 861, held the following:

> "We are not concerned with any question of the state's policy in imposing taxes, or with the various methods employed in the levee district, apart from the application of the Fourteenth Amendment. The question as to the validity of the Act of 1926 is raised only by the state tax collector in his official capacity, as one acting solely under authority of the legislature whose requirement he contests. The only person taxed by the statute whose rights are before the court is the petitioner which seeks to uphold the state legisla-

tion which defines its liability and with which it has complied. * * * While, so far as state practice is concerned, the authority of a public officer to assail in the courts of the state the constitutional validity of a state statute is a local question, this fact does not alter the fundamental principle, governing the determination of the Federal question by this Court, that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through discriminations which the Amendment forbids. The constitutional guarantee does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied equal protection of the laws." Citing Smith v. Indiana, 191 U. S. 138, 148, 48 Law. Ed. 125; Huntington v. Worthem, 120 U. S. 97, 101, 30 Law. Ed. 588; Stewart v. Kansas City, 239 U. S. 14, 16, 60 Law. Ed. 120, 121.

Where a Local Revenue State Law Is Involved, the United States Supreme Court Is Not Interested in Review for There Is No Federal Question.

In construing Mason's Minnesota Statutes 1927, paragraphs 2246, 2247, imposing tax on railroads based on gross earnings arising out of debits and credits for exchange of freight cars with other railroads, computed according to the Burlington formula, it was held that the Supreme Court of the United States would defer to the State court's interpretation that credits taxed were gross earnings within the meaning of the statute. Illinois Central R. R. v. State of Minnesota, 60 Sup. Ct. 419, 309 U. S. 157, 84 Law. Ed. 670.

Furthermore, it has been held that the United States Supreme Court will not decide an issue of the constitutionality of a state statute if the case may justly and reasonably be decided upon the construction of the statute under which the Act is clearly constitutional. Thompson

v. Consolidated Gas Utilities Corp., 57 Sup. Ct. 364, 300 U. S. 55, 81 Law. Ed. 510.

It was held in the case of Chemical National Bank v. City Bank, 160 U. S. 646, 16 Sup. Ct. 417, 40 Law. Ed. 568, that where the state appellate court reviewed the judgment of the trial court for errors committed in the trial, and, finding none, affirmed it, and the Supreme Court of the State affirmed the judgment of the appellate court, and the claim of mandate of the laws of the United States was not set up in the trial court, the judgment is not subject to review in the Supreme Court of the United States.

In the case of New York v. Roberts, 171 U. S. 658, 19 Sup. Ct. 58, 43 Law. Ed. 323, it was held that the action of the State Comptroller in determining, for the purpose of taxation, the amount of the capital stock of a foreign corporation employed within the state, confirmed by the Supreme Court of the State, does not present a federal question.

It has been held by this court that, "It is elemental and needs no citation of authority to show that the due process clause of the Fourteenth Amendment does not control methods of state procedure but gives jurisdiction to this court to review mere errors of law alleged to have been committed by the state court in the performance of its duties within the scope of its authority concerning matters not federal in character." McDonald v. Oregon Navigation Company, 233 U. S. 665, 34 Sup. Ct. 772, 58 Law. Ed. 1145.

It is basic law and has been ruled on many times by this Court, that where the state law is admitted to be valid and the only question is whether it has been correctly construed, the Supreme Court of the United States has no jurisdiction. Further, that the decision of the state court resting upon the construction and not upon the validity of the statute of the State, does not present a fed-

eral question. Commercial Bank v. Buckingham, 5 Howard 317, 12 Law. Ed. 169, and Lasseur v. Price, 12 Howard 1259, 13 Law. Ed. 893; Grand Gulf R. R. Co. v. Newhall, 12 Howard 165, 13 Law. Ed. 938; Snell v. Chicago, 152 U. S. 191, 14 Sup. Ct. 489, 38 Law. Ed. 408.

On the question of equal protection of law, it has been held by the Supreme Court of the United States that the Fourteenth Amendment does not draw to itself the provisions of state statutes or state laws but leaves the states free to enforce their laws under such statutory provisions and common law doctrines as they deem appropriate and it does not permit the party to bring a test of the decision in the United States Supreme Court over ruling made in the course of a trial in the state court. Buchalter v. People of the State of New York, 63 Sup. Ct. 1129, 87 Law. Ed.

In a 1943 State of Massachusetts case, Connor v. Metropolitan District Water Supply Co., 49 N. E. (2d) 593, it was held that a statutory discrimination will not be set aside as a denial of equal protection of the laws if any set of facts reasonably may be conceived to justify it.

In the case of Sacramento Municipal District v. Pacific Gas & Elec. Co., 128 Pac. (2d) 529, it was held that a wide discretion is vested in the legislature in making a statutory conclusion and every presumption is in favor of the validity of the statute and a decision of the legislature construing what is sufficient distinction to warrant conclusion will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous.

In the most recent case in the State of Missouri, State ex inf. McKittrick ex rel. Ham v. Kirby, 349 Mo. 988, 163 S. W. (2d) 990, it was held that the equal protection of law clause of the Fourteenth Amendment to the Constitution of the United States does not require an exactly equal treatment of all citizens but the legislature may, under it, create certain classes and make laws applicable to some but not all of such classes, provided the principle

of classification rests upon some real difference, bearing a reasonable and just relation to the act with respect to which classification is proposed.

In the case of Leo Feist, Inc., v. Young, 46 Fed. Supp. 622, it was determined that in the exercise of the power to tax, it is inherent that the state be free to select the subjects of taxation and to grant exemptions. It was further held in that case that even though there are inequalities of classification in the tax statute, they do not result in a denial of equal protection of the law if they result merely from the singling out of one particular class for taxation. Further, in determining whether the statute results in a denial of equal protection of the law, the court must presume that legislative distinctions have been made on a rational basis, if there is any conceivable set of facts which would support it. It was further held in this case that it is inherent in the exercise of the power to tax that the state be free to select the subjects of taxation and to grant exemptions. Citing Carmichael v. Southern Coal and Coke Co., 301 U. S. 495, 81 Law. Ed. 1245.

Any classification of taxation is permissible which has a reasonable relationship to a legitimate end of governmental action. Taxation is but the means by which government distributes the burden of its costs among those who enjoy its benefits. Welch v. Henry, 305 U. S. 134, 83 Law. Ed. 87.

Even though classification results in narrow distinctions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. New York Rapid Transit Corp. v. State of New York, 303 U. S. 573, 82 Law. Ed. 1024.

The rule of equality permits many practical inequalities. What constitutes this equality has not been, and probably never can be, precisely defined. Magouen v. Illinois Trust & Savings Bank, 170 U. S. 283, 42 Law. Ed. 1037.

The mere fact that the rate of a tax may discourage or even prevent the operation of a business within the field of the taxing authority, will not justify the court in striking down the taxing act. Magnano v. Hamilton Co., 292 U. S. 40, 78 Law. Ed. 1109.

In the very recent case of Hunter Co., Inc., v. Joseph L. McHugh, Commissioner of Conservation of the State of Louisiana, 64 Sup. Ct. 19, 88 Law. Ed., page 16, it was held that the Supreme Court of the United States is not free to and will not adjudicate the constitutionality of orders of the Commissioner of Conservation of Louisiana, under act Louisiana No. 157 of 1940, empowering him to establish oil drilling permits, and it was further held that an action challenging the validity of this act and an order thereunder relating to the establishment of such units did not properly present a federal question.

In the present case, the American Bridge Company has secured a ruling from the Supreme Court of Missouri. The matter at issue was brought to a head with reasonable promptness and the state court has interpreted and construed its own statutes and the United States Supreme Court will not upset a state court's interpretation of one of its own revenue statutes.

There is no intention of the United States Supreme Court to interfere with internal tax problems of the sovereign states. In the case of Phillips Petroleum Co. v. Green, 119 Fed. (2d) 466, 62 Sup. Ct. 72, 86 Law. Ed. 511, the Eighth Circuit Court of Appeals was called upon to determine whether the general store tax applied against Phillips, since the company contended its bulk plants were not stores, and the Eighth Circuit was called upon to determine what was a store and it found that the Iowa courts had not passed upon what was a store and the opinion of the Eighth Circuit remanded the question to the trial court "with directions to retain the bill pending a determination of proceedings being brought with reason-

able promptness in the state court in conformity with this opinion," and the court for the Eighth Circuit further said that the sole question before it was one of Iowa law as to which neither the Supreme Court of Iowa, nor any other court in the state, had ruled and that there was no need of asking the Eighth Circuit for a decision upon a debatable question of Iowa law, and that the Federal court might by deciding the issue be making a tentative answer which could be displaced tomorrow by a state adjudication.

In the recent case of McLeod v. J. E. Dilworth Company, 88 Law. Ed. 910, decided by this Court on May 15, 1944, Justice Frankfurter stated, "Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and have different opportunities afforded by the state." In the conclusion of his opinion Justice Frankfurter states, "Such a mode of adjudication would imply a duty of excessive astuteness on our part to contract the **area of free trade** among the states."

This opinion further states that the absence of a use tax indicates a desire to have an area of free trade and this opinion applied to Missouri law shows that the Missouri Legislature time and time again sought to create an area of free trade and did from time to time protect that area, and the Missouri Supreme Court in its opinion further protected such free trade area by an affirmance of the right to exclude from taxation those taxable transactions that would require a use tax. The State of Missouri created and protected an area of free trade and such is purely a local question.

In the present case, the Missouri Supreme Court has correctly decided the matter on what the legislature intended not to tax, and the question of what they have a right to tax is not in litigation, nor is that a matter for the court to pass on. The Legislature of the State of Missouri has elected not to tax the subject in controversy and

therefore there can be no constitutional question involved because the State has unlimited powers and it has not exercised all of its powers and if it fails to exercise all of its taxing powers then it could not have violated the Constitution.

The Attorney General of the State of Missouri on February 8, 1941, rendered an opinion in connection with the Missouri Sales Tax Act, which opinion is in conformity with the decision of the Supreme Court of Missouri in the present case. Appendix page 16.

CONCLUSION.

We desire to call the Court's attention to the fact that practically all the authorities cited by the State Auditor in support of his petition for writ of certiorari are from dissenting opinions of this Court or from opinions which have been overruled. In view of this we felt that the most learned and considered decision of the Missouri Supreme Court below is correct and presents no conflict of decisions nor violations of the Fourteenth Amendment, since the State Auditor is not a proper party petitioner and there is no Federal question involved.

The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

WALTER R. MAYNE,
NELSON W. HARTMAN,
Attorneys for American Bridge Company,
Respondent.

FORDYCE, WHITE, MAYNE,
WILLIAMS & HARTMAN,
Of Counsel.

APPENDIX.

Section 11409. Missouri Sales Tax Act, Laws of 1941, pages 702 and 703.

Exemptions.—There is hereby specifically exempted from the provisions of this article and from the computation of the tax levied, assessed or payable under this article such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state. In order to avoid double taxation under the provisions of this article, no tax shall be paid or collected under this article upon the sale at retail of any motor fuel, subject to an excise or sales tax under another law of this state; or upon the sale at retail of fuel to be consumed in manufacturing or creating gas, power, steam, electrical current or in furnishing water to be sold ultimately at retail; or feed for livestock or poultry, which is to be used in the feeding of livestock or poultry to be sold ultimately in processed form or otherwise at retail; or grain to be converted into foodstuffs which are to be sold ultimately in processed form at retail.

Opinion of Attorney-General.

February 8, 1941.

Mr. Thomas N. Dysart, President
St. Louis Chamber of Commerce

Mr. George A. Catts
Executive Manager
Kansas City Chamber of Commerce

Gentlemen:

Your inquiry of January 2, 1941, is acknowledged, wherein you state:

"The Kansas City and St. Louis Chambers of Commerce have had hundreds of calls from members relative to the rule of the State Auditor, administering official of the two per cent Missouri Sales Tax, broadening the taxable base of interstate transactions under that law. The rule, which the State Auditor says is based upon a decision of the Supreme Court of the United States in the case of McGoldrick against the Berwind-White Coal Mining Company, in substance levies a use tax upon Missouri business complementary to the sales tax.

"In view of the fact that the Missouri Legislature in 1939 considered and refused to pass a use tax law, in addition to considering and passing a sales tax act, the rule of the State Auditor applying a use tax by regulation creates a question which can be settled only by the Attorney-General.

"The members of both the Kansas City and the St. Louis Chambers have asked whether a regulation of the State Auditor is sufficient to enforce collection of a use tax which had been rejected by the law-making body of the state.

"Because of this situation, the two Chambers of Commerce jointly are desirous of ascertaining whether or not

you, as Attorney-General, have ruled on the question. If you have, is a copy of your opinion on the subject available? If you have not ruled on the question, and it is proper to do so, the two Chambers will appreciate it if you can indicate in an opinion whether the State Auditor is within his authority in enforcing a use tax which has been rejected by the Legislature. An opinion by you will be of vital concern to thousands of taxpayers throughout Missouri.

"The Kansas City and St. Louis Chambers of Commerce make this inquiry and request jointly."

While Section 11274, R. S. Mo. 1929, requires this office to give written opinions to certain public officials only, but due to the wide-spread effect and public interest in the ruling referred to in your letter, this Department feels it proper to comply with your request.

Effective as of October 1st, 1940, Honorable Forrest Smith, State Auditor, promulgated the following "Rule and Regulation":

"1. Goods Coming Into This State.

"When tangible personal property is purchased for use or consumption in this state and (1) the seller is engaged in the business of selling such tangible personal property in this state for use or consumption and (2) delivery is made in this state, such sale is subject to the sales tax. Such sale is taxable regardless of the fact that the purchaser's order may specify that the goods are to be manufactured or procured by the seller at a specified point outside this state and shipped directly to the purchaser from the point of origin.

"If the conditions above are met it is immaterial (1) that the contract of sale is closed by acceptance outside the state or (2) that the contract is made before the property is brought into the state.

"Delivery is held to have taken place in this state (1) when physical possession of the tangible personal property is actually transferred to the buyer within this state or (2) when the tangible personal property is placed in the mails at a point outside this state directed to the buyer in this state or placed on board a carrier at a point outside this state (FOB or otherwise) and directed to the buyer in this state.

"Engaging in business in this state shall include any of the following methods of transacting business: maintaining directly, indirectly or through a subsidiary an office, distribution house, sales house, warehouse or other place of business or having an agent, salesman or solicitor operating within the state under the authority of the seller or its subsidiary irrespective of whether such place of business, agent, salesman or solicitor is located in this state permanently or temporarily or whether such seller or subsidiary is qualified to do business in this state."

The Missouri Sales Tax Act has, since its inception in 1934 (Laws of 1933, Extra Session, page 156) and does now levy and impose a tax "(a) Upon every retail sale in this State of tangible personal property a tax equivalent to two (2) per cent of the purchase price paid or charged," and provides (Laws of 1939, page 861) as follows:

"The tax imposed by this Act is a tax upon the sale, service or transaction and shall be collected by the person making the sale or rendering the service at the time of making or rendering such sale, service or transaction. * * *."

A "Sale at retail" is defined as:

" 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. * * *"

Section 7 of the Act (Laws of 1939, page 861) provides:

"For the purpose of more efficiently securing the payment of and accounting for the tax imposed by this Act, the State Auditor shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of this Act, and may employ such employees and attorneys as may be necessary to carry out the provisions of this Act, and shall fix their duties, title, expenses and compensation within the limits of the appropriation acts. * * *"

When the Act was amended in 1937 the exemptions (Laws of 1937, page 558) from the tax included "retail sales may be made between this state and any other state of the United States * * *."

Section 3 of the present statute (Laws of 1939, page 860) in part provides:

"There is hereby specifically exempted from the provisions of this Act and from the computation of the tax levied, assessed or payable under this Act such retail sales as may be made between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state. * * *"

The above "Regulations" have never been passed upon by a court of last resort in this state. They present a question that cannot be answered by the decisions of other forums, due to the difference in the various statutes and ordinances levying the tax. An examination of the statutes of twenty-eight states and several city ordinances, including an ordinance of New York City, discloses only

one state other than Missouri that has exempted from the tax "transactions between this state and any other state." The above words are used in a statute of West Virginia, and, while the exemption clause of that statute has evidently never been passed upon, the statute was considered by the Supreme Court of the United States, as will be presently noted.

The usual exemption provision found in sales tax laws saves from taxation "retail sales which the state is prohibited from taxing under its Constitution and the Constitution and laws of the United States." It is apparent that such an exemption is much more restricted than the Missouri exemption.

In addition to a sales tax law at least eighteen states have enacted so-called "use tax" laws whereby the use, storage and consumption of tangible personal property was taxed. This tax was, no doubt, designed to supplement sales tax incomes by exacting a tax from tangible personal property sold in interstate commerce, after the goods have come to rest within the taxing state.

The "Regulation" above set out is an apparent attempt to impose a "use" or "consumption" tax and its effectiveness of necessity must be gaged by the Missouri Sales Tax Law and its proper construction.

The construction of a statute involves, among other things, the intention of the Legislature in passing the Act.

"* * * 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically," is properly given consideration.' * * *"

(Artophone Corporation v. Coale, 133 S. W. (2d) 343, l. c. 347.)

In this connection it is well to bear in mind that the Sixtieth General Assembly amended the Sales Tax Act in 1939, but refused to pass Committee Substitute for House Bill No. 2, which sought to impose an excise tax "upon the storage, use, or other consumption in this state of tangible personal property."

It is a well settled rule in this state that "the right of the taxing authority to levy a particular tax must be clearly authorized by the statute, and all such laws are to be construed strictly against such taxing authority" (State ex rel. Ford Motor Co. v. Gehner, 27 S. W. (2d) 1, 3, (Mo. Sup.).) and that "generally it may be said that taxing statutes are to be strictly construed in favor of the taxpayer and the fact that a particular subject of taxation, claimed to be taxed, is within the purview and intendment of the taxing statute must clearly appear from the statute so to be." (Artophone Corporation v. Coale, 133 S. W. (2d) 343, 347 (Mo. Sup.).)

The Missouri Sales Tax is an excise tax (State ex rel. Missouri Portland Cement Co. v. Smith, 90 S. W. (2d) 405) upon "every retail sale in this state" and is not a so-called "use" tax.

In passing upon a sales tax statute similar to ours, when an attempt had been made to collect a tax on certain articles purchased by a resident in a foreign state and brought into the State of Arkansas, the Supreme Court of Arkansas in the case of Mann v. McCarroll, 130 S. W. (2d) 721, held such property not subject to the tax and said, l. c. 726:

"* * * But it is a fact, not now open to controversy, that if the Legislature did intend to levy and provide machinery for the collection of a use tax, that fact was so hidden and concealed as not to be readily discoverable. As we have heretofore stated, it is conceded that if this provision of the act must be treated as a sales tax on sales made in other states, it is illegal and unenforcible.

It is on that account that the commmissioner of revenues now argues that it is a use tax, although the language used in this provision refers only to a sales tax.

"It may be said in passing that a sales tax and a use tax are by no means identical. The rule is that in a sales tax the property sold changes hands. There is a change of ownership. The new owner who purchases pays the sales tax to the seller who becomes the agent for the state for its collection.

"The buyer pays the tax as an incident to the price. In a use tax there is no change of possession, no change of ownership, but the owner pays this tax which is an excise or exaction charged because of the owner's privilege to exercise or assert some of the elements of ownership over the property. In the use tax the seller does not collect the tax as an agent for the state, but the buyer, according to the contention made here, must account for the property which he actually owns and pay a tax allegedly of the same percentage as a sales tax. * * *"

The distinction was made in New York between a sales tax and a use tax in the case of Williamsburg Power Plant Corporation, 7 N. Y. S. (2d) 326, 330, holding as follows:

"A tax on personal property situated or owned within New York City at rate of 2 per cent of value of property as determined by actual price paid for property was an 'indirect tax,' and to that extent an 'excise tax,' and was a tax upon the consumption of or the opportunity to 'use' property and was not a tax on the 'transaction' of purchase * * *."

As the Missouri sales tax is an excise tax the constitutional provision against exempting property from taxation does not apply and the Legislature may exempt any sale from the tax that it cares to exempt. State ex rel. Fath v. Henderson, 160 Mo. 190, 60 S. W. 1093; Ludlow-Saylor

Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S. W. 196; Bacon v. Ranson, 331 Mo. 985, 56 S. W. (2d) 786; State v. Parker Distilling Co., 236 Mo. 219, 139 S. W. 453; and State ex rel. Missouri Portland Cement Co. v. Smith, 338 Mo. 409, 90 S. W. (2d) 405, l. c. 407.

The Missouri law requires the transaction to be a complete transaction within its confines before the transaction is taxable, as the tax imposed is one "upon every retail sale in this State of tangible personal property" and exempts "sales * * * made between this state and any other state of the United States."

The Supreme Court of the United States in passing upon a West Virginia statute in the case of James v. United Artists Corporation, 305 U. S. 410, 59 Supreme Court Rep. 272, that imposed a tax "upon every person engaging * * * within this state in the business of collecting incomes from the use of real or personal property * * *" held:

"* * * We are not here concerned with the question whether a state, by a statute appropriately framed, may lay a tax on income derived from sources within it, or whether the solicitation of the contracts may be taxed. No such taxation is attempted by Sec. 2-(i). The taxing provisions of Sec. 2 are restricted in their application to various enumerated classes of activities within the state, one of which, specified in Sec. 2-(i), is that of engaging there in the business of collecting incomes. The conduct of such a business or activity by appellee requires its presence there, or that of its agent, and the collection of income within the state by the one or the other. As it is stipulated and found that appellee carries on no business within the state, except such as is involved in solicitation of the contracts, and has no collection agent there, and as the exhibitors there are bound to and do pay all sums due under their contracts to appellee at points outside the

state, we can find no basis for saying that it is engaged in collecting income within the state, either as a business or otherwise.

* * * * * * *

"* * * The emphasis placed by Sec. 2 and its various subsections on the carrying on of business or other specified activities within the state as the condition of laying the tax, and the fact that the exhibitors' receipts are taxed in their hands under Sec. 2-(g), lead to the conclusion that there was no legislative purpose in cases like the present to tax gross receipts apart from the business or activity of collecting them, carried on within the state. * * *"

In the above case it was sought to tax the corporation whose agent solicited for orders within the state, which orders were accepted by the office of defendant in another state and collections were remitted to that office.

*The words of exemption: "such retail sales as may be made between this state and any other state of the United States" means "sales between citizens of this state and citizens of any other state of the United States"— in short, interstate sales. This wording is comparable to the wording of Clause 3 of Section 8 of Article 1 of the United States Constitution. It has been uniformly ruled that the latter provision means: "commerce with the citizens of foreign nations, among the citizens of the several states * * *"—interstate commerce. An attempt to limit the above exemption clause of the Missouri statute to "sales made between the State of Missouri and any other state" would be absurd. It is common knowledge that one state rarely sells property to another state, while citizens of one state continuously trade with citizens of other states.*

The "regulations" attempt to tax property transported from another state or nation to a resident of Missouri

upon an order accepted in the foreign state or nation, although solicited in Missouri, and is ineffective as such transactions are "sales * * * between this state and any other state" and do not constitute a "retail sale in this state." State ex rel. Telegraph Co. v. Markay, 110 S. W. (2d) 1118, 341 Mo. 980; State ex rel. Parish v. Young, 327 Mo. 909, l. c. 915, 38 S. W. (2d) 1021; State v. Best & Co., 194 La. 918, 195 So. 356; Artophone Corporation v. Coale, 133 S. W. (2d) 343; Waseca v. Brauer, 288 N. W. 229 (Minn.); James v. United Artists Corp., 305 U. S. 410, 59 Sup. Ct. Rep. 272 and Mann v. McCarroll, 130 S. W. (2d) 721.

Due to the particular wording of the Missouri Sales Tax Act we are not concerned with the right or power of Missouri to tax interstate commerce, or the storage, use or consumption of personal property in Missouri. The right to tax interstate commerce is one question and whether the Legislature in fact laid a tax upon interstate transactions is another and distinct question.

This distinction has been pointed out by the Supreme Court of Missouri. In the case of Artophone Corporation v. Coale, 133 S. W. (2d), l. c. 347, in passing upon a provision of the income tax law, it was held:

"We need not here discuss or consider the question whether or not the Legislature could tax the entire net income from all sources of a domestic corporation. The question is, does the present law do so?"

Again, in State v. Shell Pipe Line Co., 139 S. W. (2d) 510, l. c. 519, it is said:

"It is of slight consequence that the state may have the power to levy a franchise tax on a foreign corporation authorized to transact business in Missouri, but which may not be doing so, unless the state has exercised that power by appropriate legislation."

The "regulation" is evidently based upon the holding of the United States Supreme Court in the case of McGoldrick v. Berwind-White Coal Mining Company, 309 U. S. 33, 84 L. Ed. 565. In that case the court considered and held good an ordinance of the City of New York imposing a tax "upon purchasers for the consumption of tangible personal property" in the City of New York. While the decision is far-reaching the ordinance involved is so different from the Sales Tax Act of Missouri that it affords little support to the "regulations" here involved. The decision turns upon the right of a state or city to tax tangible personal property brought into such state or city from another state upon a contract entered into with a resident agent of the seller in the taxing state or city, which contract provides for the delivery of the property in the territory of the taxing power. The ordinance does not exempt interstate commerce and the tax was imposed by legislation (a city ordinance) and not by rule or regulation of an administrative officer.

While Missouri's sales statutes provide that the State Auditor may make rules and regulations for the enforcement of the act, such provisions do not authorize the Auditor to collect a tax not specifically laid by the Legislature, as the Legislature only may impose a state tax. Article X, Section 1, Constitution of Missouri; State ex rel. Parish v. Young, 38 S. W. (2d) 1021, 327 Mo. 909, l. c. 915.

The right to levy a tax may not be delegated by the Legislature to an administrative officer. Merchants Exchange v. Knott, 212 Mo. 616; State ex rel. Field v. Smith, 329 Mo. 1019, l. c. 1027; Little River Drainage District v. Lassater, 325 Mo., l. c. 502-3.

CONCLUSION.

It is the conclusion of this Department that the above-quoted "regulation" in so far as it attempts to tax the sale of tangible personal property outside the State of Missouri and delivered in Missouri to the purchaser, even though purchased upon an order given to an agent of the seller in Missouri, but where the order is finally accepted in a foreign state, and also sales of tangible personal property in Missouri, to a citizen of another state and where such property is not purchased for consumption in Missouri but for the purpose of being transported to the other state, is invalid.

Respectfully submitted,

(Signed) Vane C. Thurlo,
Assistant Attorney-General.

Approved:

(Signed) Roy McKittrick,
Attorney-General.

VCT:CP

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

FORREST SMITH, State Auditor of the State of Missouri, *Petitioner*,
vs.
AMERICAN BRIDGE COMPANY, a Corporation, *Respondent*.

NO. 1045.

PETITIONER'S REPLY BRIEF.

ROY McKITTRICK,
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J. W. THURMAN,

TYRE W. BURTON,
Jefferson City, Mo.,

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Kansas City, Mo.,

WM. G. MARBURY,
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PETITIONER'S REPLY BRIEF.

Counsel for the American Bridge Company in their brief in opposition have attempted to inject for the first time the issue of where the sales involved in the controversy were made. We shall demonstrate to this Honorable Court that the only question before the State Court for decision was whether or not Section 11409 R. S. Missouri 1939, as amended, Laws 1941, page 702, was intended as a blanket exemption of all interstate transactions. In the brief in opposition under "Questions Presented," we find this statement:

> "There were two questions at issue before the Missouri Supreme Court; one, whether the sales which were made by American Bridge Company to customers and users within the State of Missouri were sales made in the State of Missouri; two, whether certain types of sales made by American Bridge Company to customers for use and consumption in the State of Missouri were such sales as to be specifically exempted under Section 11409, R. S. Mo. 1939, as amended, Laws of 1941, pages 698 to 714."

The question presented to the State Supreme Court, according to the brief of appellant, page 22, sub-section (2) was:

> "The principal questions before the Court in this case are two in number: First, is the appellant engaged in interstate commerce with respect to its sales to customers, users and consumers in the State of Missouri, and, second, are such sales, if in interstate commerce, exempted under the provisions of the Missouri Sales Tax Act of 1939, R. S. Mo. Section 11409, as amended by Laws of 1941, page 702?"

The petitioner herein in his brief to the Missouri Supreme Court at the bottom of page 12 of said brief made this statement:

> "The appellant contends that all the sales involved in this case are interstate sales. We concede that said sales are interstate in character."

We submit, therefore, that the only question before the Missouri Supreme Court was whether or not the transactions, being in interstate commerce, were exempt from the Missouri Sales Tax Act by virtue of the provisions of said Section 11409.

In its brief in opposition the Bridge Company argues that statement No. 1 of "Reasons Relied for Allowance of Writ" is incorrect for the reason that the decision of the State Supreme Court involves the construction and meaning of a revenue statute of the state. The argument is devoted almost exclusively to the development of this theory. We submit, therefore, that counsel have missed the point entirely that is being presented by petitioner to this Honorable Court, thus, the cases cited and discussed under heading, "Where a local revenue state law is involved, the U. S. Supreme Court is not interested in review for there is no Federal question" are of no particular significance and are entitled to no weight in the consideration of this case. We think this sufficiently disposes of the cases cited under this point.

Even though the construction and meaning of a revenue statute of the state was involved, yet the construction placed on that statute by the Missouri Supreme Court holding that the statute was "reasonable," in its application is sufficient to raise a Federal question. It is conceded by the petitioner that the construction of a state revene statute was involved and was for decision by the State Supreme Court, yet the same court was required to determine the reasonableness of the statute and whether or not such a construction would render the statute void as being in violation of the equal protection clause of the 14th amendment to the Federal Constitution. The construction of a state revenue statute is strictly a question for decision by the State Court, and had the State Court not entertained and decided the constitutional question then, of course, this court would have no jurisdiction as no Federal question would be involved. We have demonstrated, however, that the Federal question was entertained and decided by the State Court, and are relying upon this fact to sustain the jurisdiction of this Honorable Court to decide the issues here involved.

THE MISSOURI SUPREME COURT HAVING ENTERTAINED THE CONSTITUTIONAL QUESTION AS RAISED BY THE PETITIONER WHO IS A STATE PUBLIC OFFICER, THEN THIS COURT SHOULD TAKE JURISDICTION AND REVIEW THE OPINION.

The American Bridge Company contends that, since the petitioner herein is a public officer, he does not have such an interest in this cause of action as would authorize him to raise a constitutional question. We take no issue with the rule laid down in the case of Columbus and Greenville Railroad Company v. W. J. Miller, State Tax Collector, 32 U. S. 69, 51 S. Ct. 393, 75 Law Ed. 816, which is the only authority cited in the brief in opposition. The exception to the rule, however, that consideration of the Federal question by a state court suffices to give this Honorable Court jurisdiction to hear and decide the issues, is emphasized. Counsel for the American Bridge Company either

designedly or through inadvertence omitted from the decision a very important sentence. As heretofore stated, the petitioner, in order to sustain the jurisdiction of this honorable Court, takes the position that since the Missouri Supreme Court entertained and decided the Federal question, then jurisdiction of this Honorable Court attaches to review the decision of the State Court. For the purpose of clarity, we desire to quote the portion of the decision relied upon by counsel for the Bridge Company, which includes the omitted sentence. For the convenience of the court, we have emphasized what we consider the pertinent portion of the decision:

> "We are not concerned with any question of the state's policy in imposing taxes, or with the various methods employed in the levee district, apart from the application of the Fourteenth Amendment. The question as to the validity of the act of 1926 is raised only by the state tax collector in his official capacity, as one acting solely under the authority of the Legislature whose requirement he contests. The only person taxed by the statute whose rights are before the court is the petitioner, which seeks to uphold the state legislation, which defines its liability and with which it has complied. *The questions which the collector sought to raise under the state Constitution have not been passed upon by the state court.* While, so far as state practice is concerned, the authority of a public officer to assail in the courts of the state the constitutional validity of a state statute is a local question, this fact does not alter the fundamental principle, governing the determination of the federal question by this court, that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws." (Citing cases)

The petitioner points out that while the court announced the general rule with respect to public officers raising the constitutional question, nevertheless they did consider the constitutional question raised by the public officer. In that case the collector had contended that the Act of 1926 relating to taxation of railroads was unconstitutional for certain reasons.

This court at l. c. 394 said:

> "As we find no ground for holding the act of 1926 to be invalid under the Federal Constitution, it is unnecessary to consider the questions discussed in relation to the act of 1914."

In the case of Columbus and Greenville Railroad Company v. W. J. Miller, State Tax Collector, supra, which first came before the Mississippi Supreme Court, that court did not pass upon the constitutional question raised by the collector, while in the case at bar the Missouri Supreme Court has passed on the constitutional question raised by the petitioner herein, and under such a circumstance the principle announced by the court in the Columbus and Greenville Railroad Company case is not applicable here.

If the Mississippi Supreme Court had passed on the constiutional question raised by the collector in the Columbus & Greenville Railroad Company case, then petitioner submits that this court would not have stated the foregoing principle because it said:

> "The questions which the collector sought to raise under the state Constitution have not been passed upon by the state court."

WHERE THE CONSTRUCTION OF A REVENUE ACT INVOLVES A FEDERAL QUESTION THE UNITED STATES SUPREME COURT IS INTERESTED IN REVIEWING SUCH A CONSTRUCTION.

The American Bridge Company takes the position that where a local revenue statute is involved that the United States Supreme Court is not interested in review for there is no Federal question.

The petitioner is in accord with the statement of the American Bridge Company but disagrees in its conclusion that there is no Federal question in this case.

In support of our position in this statement the petitioner calls the court's attention to Quaker City Cab Company v. Commonwealth of Pennsylvania, 277 U. S. 389, 48 S. Ct. 553, in which the court held that the United States Supreme Court is not bound by state court's characterization of tax imposed by state law in determining validity under equal protection clause of the Fourteenth Amendment.

The same principle was applied in Hartford Steam Boiler Inspection and Insurance Company et al. v. Harrison, 301 U. S. 459, 57 S. Ct. 838. Also in the case of Bethlehem Motors Corporation et al. v. Flynt, 266 U. S. 421, 41 S. Ct. 571, the United States Supreme Court held that an increased license fee from corporations not having specified investments within state discriminates against foreign corporations.

Also in the case of Kansas City Southern Railroad Company et al. v. Road Improvement District No. 6 of Little River County, Arkansas, 256 U. S. 658, 41 S. Ct. 604, this court held an arbitrary assessment of railroad for road improvement when other property was assessed on basis of area and position denies equal protection of the laws.

In the case of F. S. Royster Guano Company v. Commonwealth of Virginia 253 U. S. 412, 40 S. Ct. 560, this court applied the same principle to a state law and held that a classification for tax purposes must rest upon some reasonable grounds of difference.

Respectfully submitted,

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